United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-133

To be argued by
BENJAMIN ZELERMYER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1337

UNITED STATES OF AMERICA,

Appellee,

against

NELSON CRUZ,

Defendant-Appellant.

Appeal from Order of the United States District Court for the Southern District of New York (D.C. Crim. No. 75 Cr. 1150)

BRIEF ON BEHALF OF APPELLANT NELSON CRUZ

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UNITED STATES COURT OF APPEALS
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* See also, Statutory Appendix.

MISCELLANEOUS

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Preliminary Statement

Defendant-Appellant Nelson Cruz appeals from an order entered on July 8, 1976, by the United States District Court for the Southern District of New York (Frankel, J.). As amended on July 15, 1976, and supplemented on July 23, 1976, that order denied Cruz' motion, pursuant to Rule 35, F.R.Crim.P.,

to reduce sentence, relegating Cruz to a separate action to obtain relief to which the District Court found Cruz was entitled. The decision of the District Court (A. 40)[1] has not yet been reported.

Statement of Issue Presented for Review

Was the District Court's refusal to exercise its discretion to grant relief from the flouting of the judgment by the Department of Justice an abuse of discretion?

Statement of the Case

The Indictment

On November 24, 1975, a grand jury in the Southern District of New York returned an indictment naming Nelson Cruz and three others as defendants (A. 3). Count One charged Cruz and the others with conspiracy in violation of 18 U.S.C. §371; Count Two charged Cruz and two of the other defendants with theft from an interstate shipment in violation of 18 U.S.C. §659. Cruz was not named in Count Three. On December 23, 1975, Cruz withdrew his plea of not guilty to Count One and entered a plea of guilty to that Count. The District Court accepted the plea.

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[1] References are to pages in the Appendix.

The Sentence

On February 11, 1976, after discussion with counsel concerning the sentencing alternatives available (A. 16-19), the District Court sentenced Cruz to two years' imprisonment under the Youth Corrections Act (18 U.S.C. §5005 et seq. [the "Act"])[2] as extended by 18 U.S.C. §4216 (formerly §4209). In pertinent part, the Judgment reads as follows:

> The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. Defendant is sentenced as a YOUNG ADULT OFFENDER pursuant to Section 5010(b), Title 18, U.S. Code, as extended by Section 4209. It is the intention of the Court that defendant should be deemed eligible for release from custody under Section 5017(c), Title 18, U.S. Code, at any time when the Youth Division deems such release to be justified under the governing law administered by that Division. (A. 22).[3]

No objection was expressed by the United States Attorney.

Having pronounced sentence, the District Court delineated its expectations concerning Cruz' ultimate release from custody:

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2 The pertinent sections of the Act and certain other applicable provisions of Title 18, U.S.C. are reproduced in a statutory appendix to this brief.

3 Count Two was dismissed on consent of the government.

> . . .I suspect that it is not very likely that Mr. Cruz will get out much under 16 months given the guidelines,[4] but the record will show that it is the desire of the Court that his consideration for earlier release be studied thoughtfully and that the Youth Division not deem itself mechanically or automatically bound by any mathematical computations under the guidelines. . . .
>
> I would hope and expect that the Youth Division will not fail to pay attention to the individual circumstances of his particular case. (A. 19,20).

Again, no objection was voiced by the United States Attorney, and no appeal was taken.

Thus, Cruz was sentenced to two years' imprisonment as a young adult offender and was to be considered for early release. Upon his unconditional discharge prior to the expiration of the maximum sentence imposed, his conviction was to be automatically set aside pursuant to 18 U.S.C. §5021.

The Bureau of Prisons and the Parole Commission

Cruz surrendered and began serving his sentence on February 23, 1976. In early April, shortly after he had been transferred from the Metropolitan Correctional Center to the Federal Reformatory at Petersburg, Virginia,[5] Cruz was informed

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4 The District Court was referring to the guidelines for parole release consideration (28 C.F.R. §2.20) established by the United States Board of Parole (now the Parole Commission, 18 U.S.C. §4202 [1976]).

5 Cruz has recently been transferred to the Kennedy Center at Morgantown, West Virginia, a minimum security facility.

by the Bureau of Prisons that it considered all Youth Correction Act sentences to be indeterminate, and that the District Court had no authority to limit the term of imprisonment to two years. Cruz was also advised that the Bureau would write to the Court for clarification, which it ultimately did (A. 28).

In early May, the Parole Commission notified Cruz that it too considered the sentence to be indeterminate and that, based on its guidelines, he would not be considered for release until November 1977, when he had served twenty-one months of his two-year sentence (A. 38). This notwithstanding the facts that Cruz should have been scheduled for mandatory unconditional release (under 18 U.S.C. §§4161, 4163 and 4164) after nineteen months, that the District Court had expressed its expectation that Cruz would be released in approximately sixteen months, and that the District Court had specifically urged consideration of early release.

The Sentence-Reduction Motion

On May 20, 1976 (within 120 days after the imposition of sentence), Cruz moved to reduce sentence on the ground of leniency and because reduction of sentence would be an appropriate means of effectuating the District Court's sentencing objectives in the face of the unanticipated refusal of the Bureau of Prisons and the Parole Commission to carry out the sentence imposed.

The United States Attorney neither supported nor opposed the motion to reduce. Instead, the government responded by arguing that the sentence imposed was invalid, supporting the position expressed by the Bureau of Prisons. On July 8, 1976, the District Court ruled that (a) a sentence under the Act could properly include a maximum term of less than six years and therefore the sentence imposed on Cruz was valid (A. 44-47) and (b) because no objection had been voiced and no appeal taken from the judgment, the government was obligated to treat the sentence as valid even if it were not and to carry it out in accordance with its terms (A. 43).

The District Court also ruled that Cruz "is entitled to some relief" (A. 40); that "the fractioned and inconsistent handling of this case by the Department of Justice is a matter obviously to be regretted and corrected" (A. 43); and that "the flouting of the judgment" was to be ended (A. 48). Despite these rulings, however, the District Court refused to exercise its discretion to reduce Cruz' sentence. Instead, the Court below directed the United States Attorney to report "whether the Bureau of Prisons and the Parole Commission will administer the judgment in accordance with its terms." (A. 47-48)

On July 22, 1976, the United States Attorney reported that the government would continue to disregard the sentence imposed (A. 52). Thus, rather than receiving the benefits the District Court explicitly intended to confer by sentencing Cruz

to a definite term under the Act--an outside limit of nineteen months on the term of confinement and the opportunity for earlier release and expungement (see A. 41, 42)--Cruz finds himself in a worse position than those who are sentenced either as adults or under the Act. The Parole Commission will refuse to consider Cruz for release until he has served twenty-one months of a twenty-four month sentence. The Bureau of Prisons will refuse to credit Cruz with any "good time". And the Parole Commission will refuse to issue an expungement certificate. In the absence of some action by the District Court, Cruz will be incarcerated longer than adults serving two-year terms; yet he will be denied the opportunity for early release and to have his conviction set aside (A. 52-57).

The District Court issued a supplementary memorandum on July 23 (A. 58). Although it recognized "that those who have Mr. Cruz incarcerated plan to follow their own rather than the Court's understanding of the judgment notwithstanding that no appeal was ever taken from that adjudication", the Court below continued its refusal to exercise its discretion by reducing sentence, instead relegating Cruz to a separate action "to compel obedience to the judgment of the Court." This appeal followed.[6]

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6 In an effort to fully protect his rights, on August 20, 1976, Cruz commenced an action in the nature of mandamus against the Attorney General, the Director of the Bureau of Prisons and the Chairman of the Parole Commission. (76 Civ. 3728 [MEP], S.D.N.Y.). Since the point of this appeal is that the District Court should have acted and that a separate action should be unnecessary, the pendency of that action does not render the appeal moot.

Summary of Argument

Having learned that the government's administration of the sentence imposed upon Cruz would depart substantially from its sentencing expectations, the District Court had the authority--and the responsibility--to reduce or modify the sentence in order to effectuate those expectations. The District Court's refusal to act, particularly in light of its finding that Cruz was entitled to relief, constituted an abuse of discretion. The order denying Cruz' timely motion to reduce sentence should be vacated and the case remanded to the District Court for resentencing.

Argument

THE DISTRICT COURT'S REFUSAL TO EXERCISE ITS DISCRETION WAS AN ABUSE OF THAT DISCRETION

This Court has squarely held that when the realities of release consideration do not comport with sentencing expectations, resentencing is the appropriate mechanism for rectifying the disparity. In United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975), the defendants were sentenced to five years' imprisonment, but were made eligible for parole at any time pursuant to 18 U.S.C. §4208(a)(2),[7] rather than after completion

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7 Under the recent Parole Commission and Reorganization Act, Pub. L. 94-233, §2, Mar. 15, 1976, 90 Stat. 222, this section has been reenacted as 18 U.S.C. §4205(b)(2).

of one-third of the sentence under 18 U.S.C. §4202.[8] At the time of sentencing, the district court was unaware of the release guidelines[9] adopted by the Board of Parole to indicate the customary ranges of time to be served before release for various combinations of offenses and offenders. 514 F.2d at 1227.

At that time, this Court and district courts in this circuit expected the Board of Parole to grant parole consideration to prisoners sentenced under Section 4208(a)(2) prior to completion of one-third of the term imposed. Under the guidelines, however, and the Board of Parole's procedures, prisoners so sentenced received no serious parole consideration until the one-third point, when they would have received it anyway under former Section 4202:

> Thus, from the standpoint of an opportunity for early release, the (a)(2) prisoner is in no better position than a prisoner who has received a regular sentence. . . . For the narrow purposes of this case, we need only determine whether the procedures are consistent with what we must assume were the reasonable expectations of the sentencing judge. We conclude that they are not. 514 F.2d at 1229. [Footnote omitted.]

Because the defendants in Slutsky would not receive the release consideration anticipated by the district court

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8 Now 18 U.S.C. §4205(a).

9 See note 4, supra.

he time of sentencing, resentencing was held to be the
opriate means of resolving the dichotomy. This Court
ted the sentences and remanded to the district court:

> Since in all probability the appellants will not receive the parole treatment envisioned by the sentencing judge, there should be an opportunity for reconsideration in light of all recent developments in the area. An unfortunately mistaken assumption about the effect of a Section 4208(a)(2) sentence perhaps does not rise to the level of a sentencing judge's mistaken impression of a defendant's prior criminal record . . . . But the parole implications of a sentence are a necessary and important factor for the consideration of the sentencing judge. And when, as here, there has been a timely motion for reduction of sentence, and the mistake is easily rectified by providing for resentencing, the interests of justice mandate such a procedure. 514 F.2d at 1229.

The parallels between Slutsky and the present case
striking: In both, defendants were sentenced under
visions of law conferring particular benefits (there, the
ssibility of early release; here, the possibilities of early
lease and expungement); in both, the sentencing judge's
lease expectations were to be frustrated by procedures in
e Department of Justice (there, by operation of the guidelines;
re, by the Parole Commission's intention not to issue an
pungement certificate, as well as by operation of the guide-
nes and Bureau of Prisons policy[10]) of which the district

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[10] See BOP Policy Statement 7600.58 (10-9-73) (A. 54).

court was unaware at the time of sentencing; in both, defendants made timely motions to reduce sentence pursuant to Rule 35, F.R.Cr.P.;[11] and in both, sentencing expectations could readily be achieved by resentencing.

Furthermore, there is no need for this Court to indulge in guesswork concerning the sentencing expectations of the District Court or the release treatment Cruz will receive at the hands of the Bureau of Prisons and the Parole Commission. Both have been set out in black and white and they are diametrically opposed: Rather than being considered for release within sixteen months, as the District Court expected (A. 19), Cruz will receive no release consideration until he has served twenty-one months (A. 52); rather than being mandatorily released after nineteen months, as the District Court expected (A. 41-42), Cruz will be denied any credit for "good time" (A. 52, 55); rather than receiving an expungement certificate, as the District Court expected (A. 49,n.2), Cruz will be denied one (A. 53, 56). In these circumstances, sentence reduction is the appropriate vehicle for effectuation of the District Court's expectations.

Since this Court's decision in Slutsky, other courts, faced with similar disparities, have found precisely the same

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11 In pertinent part, Rule 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed . . . .

solution. See, e.g., Kortness v. United States, 514 F.2d 167, 170 (8th Cir. 1975); United States v. Manderville, 396 F.Supp. 1244,1249 (D.Conn. 1975): "While courts have correctly expressed reluctance to function as super-parole boards . . . they should not be reluctant to modify sentences when assumptions which they entertained at the time of sentencing with regard to parole possibilities have subsequently been invalidated"; and DiRusso v. United States, 409 F.Supp. 1055,1058 (D.Mass. 1976):

> While, under normal circumstances, the Parole Board may have discretion to apply its guidelines to persons committed for treatment under the Youth Corrections Act, that discretion does not relieve a sentencing court of its responsibility to correct a sentence which was imposed under a misapprehension as to the potential impact of an application of that discretion.

The contrast between the exercise of discretion this situation calls for and the refusal of the Court below to meet its responsibility is starkly apparent from a comparison of the decision below with that rendered in United States v. Randle, 408 F.Supp. 5,7 (N.D.Ill. 1975):

Randle	Cruz
In effect, the Parole Board has substituted its guidelines for the judgment of the sentencing judge as to the appropriate sentence for the particular defendant. As a consequence, the only way a judge can effectively exercise his sentencing responsibility and judgment is to impose a sentence which, less statutory good time, will result in the period of incarceration he deems appropriate and forget about the Parole Board and the possibility of parole.	It appears that those who have Mr. Cruz incarcerated plan to follow their own rather then the court's understanding of the judgment notwithstanding that no appeal was ever taken from that adjudication. Accordingly, as has been indicated, the court anticipates that [Cruz] will proceed promptly to bring an appropriate form of action, here or elsewhere, to compel obedience to the judgment of the court. (A. 58)

The District Court had the authority and the responsibility to reduce, modify or correct the sentence imposed on Cruz when it learned that its sentencing expectations would not be realized. Relegating to Cruz the burden of bringing a separate action against other parties in order to obtain relief from a situation which the District Court found it was "incumbent upon the Attorney General to redress" (A. 47) was unwarranted and unjustifiable.[12] The District Court's refusal to exercise its discretion constituted an abuse of discretion which is both reviewable and reversible by this Court. Dorszynski v. United States, 418 U.S. 424,443 (1974); Yates v. United States, 356 U.S. 363, 366-67 (1958); United States v. Hartford, 489 F.2d 652,654 (5th Cir. 1974); United States v. DiNapoli, 519 F.2d 104,107,109 (6th Cir. 1975); United States v. Ingram, 530 F.2d 602,603 (4th Cir. 1976); United States v. Hopkins, 531 F.2d 576,580 (D.C.Cir. 1976).

As it did in Slutsky, this Court should vacate the order denying Cruz' motion to reduce sentence and remand to the District Court for resentencing.

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12 Contrary to the District Court's ruling that Cruz' Rule 35 motion to reduce sentence "was not an effective device (nor a procedure naming the appropriate defendants) to accomplish the correction deemed necessary" (A. 53), the decisions cited above establish that the necessary correction can be accomplished through a variety of procedural devices: Slutsky, Manderville and Randle involved motions to reduce sentence; Kortness and DiRusso decided petitions under 28 U.S.C. §2255. None included any parties other than the prisoner-defendants and the United States of America.

CONCLUSION

For all the reasons appearing above, this Court should vacate the District Court's order denying Cruz' motion and remand to the District Court for resentencing.

Respectfully submitted,

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STATUTORY APPENDIX

§ 4161. Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

§ 4163. Discharge

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper. If such release date falls upon a Saturday, a Sunday, or on a Monday which is a legal holiday at the place of confinement, the prisoner may be released at the discretion of the warden or keeper on the preceding Friday. If such release date falls on a holiday which falls other than on a Saturday, Sunday, or Monday, the prisoner may be released at the discretion of the warden or keeper on the day preceding the holiday.

§ 4164. Released prisoner as parolee

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

This section shall not prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody.

§ 4202. Parole Commission created

There is hereby established, as an independent agency in the Department of Justice, a United States Parole Commission which shall be comprised of nine members appointed by the President, by and with the advice and consent of the Senate. The President shall designate from among the Commissioners one to serve as Chairman. The term of office of a Commissioner shall be six years, except that the term of a person appointed as a Commissioner to fill a vacancy shall expire six years from the date upon which such person was appointed and qualified. Upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

§ 4216. Young adult offenders

In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration the previous record of the defendant as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C., chap. 402) sentence may be imposed pursuant to the provisions of such Act.

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.

§ 5017. Release of youth offenders

(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.

(b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Commission.

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Commission shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.